

March 16, 2011

EX PARTE

VIA ELECTRONIC FILING

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554**Re: Ex Parte WC Docket No. 07-245; GN Docket No. 09-51**

Dear Ms. Dortch:

This is in further support of the Petition for Reconsideration filed by the State Cable Associations and Cable Operators concerning the Commission's construction of "insufficient capacity" under Section 224(f)(2)¹ and in response to the March 10, 2011 *ex parte* filed by the Florida IOUs (Progress Energy Florida, Tampa Electric, Florida Power & Light, Florida Public Utilities and Gulf Power).² The Commission should revisit its *Pole Order* on this issue to require utilities that perform pole changeouts for themselves, joint owners, or other joint users to also changeout poles on a nondiscriminatory, cost-justified basis for other existing or new attachers, unless external factors physically preclude installing taller poles. We explain below that the decision in *Southern Co. v. FCC*, 293 F.3d 1339 (11th Cir. 2002), did not condone discriminatory *denials* of access, and the terms of 47 U.S.C. § 224(f)(2) expressly *prohibit* discriminatory denials of access. Accordingly, under both § 224 and *Southern Co.* utilities may deny access for insufficient capacity *only* on a nondiscriminatory basis—that is, by applying the same nondiscriminatory terms and conditions with respect to pole replacement that it imposes on third parties and itself.

¹ See Petition for Reconsideration or Clarification of Alabama Cable Telecommunications Association, *et al.*, WC Docket No. 07-245, GN Docket No. 09-51, Sept. 2, 2010 (seeking review of pole changeout conclusions in *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, 25 FCC Rcd. 11864 (2010) ("Pole Order")); Reply to Oppositions to Petition for Reconsideration of Alabama Cable Telecommunications Association, *et al.*, WC Docket No. 07-245, GN Docket No. 09-51, Nov. 12, 2010. CTIA and Time Warner Cable supported the Petition. Comments of Time Warner Cable Inc. Regarding Petitions for Reconsideration, WC Docket No. 07-245, GN Docket No. 09-51, Nov. 1, 2010, at § II; Comments of CTIA – the Wireless Association, WC Docket No. 07-245, GN Docket No. 09-51, Nov. 1, 2010, at 6-9.

² See *ex parte* notice dated March 10, 2011 filed by Eric Langley, Balch & Bingham LLP.

Pole replacements have been a routine part of pole ownership and pole makeready for decades.³ When utilities (or joint owners) need additional height, and the pole location can accommodate it, they replace poles with taller poles (of varying heights, from 35-50 feet) that they hold in store ("pole yards") for all pole replacements and renewals.⁴ The only difference in changeout procedure is who pays for it. For a utility's own purposes (adding new primary or secondary power lines), the utility pays and everyone moves their facilities to the new pole.⁵ When it is a joint user or owner, the party requesting the changeout pays, just as provided in § 224(i).⁶

Changeouts are not requested by attachers because they are easier or less expensive alternatives. They are sought only when measures like boxing, bracketing, or rearrangement will not allow further access to a given pole.⁷ However, in considering these options, when utilities

³ See Deposition of Ben Bowen, Gulf Power Project Service Specialist, Senior ("Bowen Dep."), *Florida Cable Telecommunications Association, Inc., et al. v. Gulf Power Co.*, EB Docket No. 04-381 ("FCTA v. Gulf Power"), Hearing Exhibit 84 at p.17, ll 18-19 (poles are changed out daily), at p. 53 ll. 16-21 (changeouts typically done for height and strength), at p. 56 ll. 3-18 (taller poles set based on need and terrain up to 50 foot), at p. 57 ll. 7-13 (different height poles kept in each district office's pole yard); Deposition of Rex Brooks, Gulf Power Senior Engineering Representative (Retired) ("Brooks Dep."), Hearing Exhibit 85 at p.45 ll.18- 23, p. 46 ll. 1-4, ll. 16-23; p. 47 ll. 1-19 (explaining only occasional denials of access due to engineering where utility could not physically change the height of the pole, with an example given of a two-pole configured transformer platform that limits height changes due to necessary clearances and strain on adjacent poles) (all excerpts Exhibit 1 hereto). Based on such testimony, the judge in *FCTA v. Gulf Power*, ALJ Initial Decision, 22 FCC Rcd. 1997, ¶ 20 (2007) confirmed that utilities generally accommodate changeouts, and that "the industry's established remedy" as part of "normal and customary make-ready" is to require "rearrangements, including pole change-outs" where necessary. *Id.* ¶ 22 & n.11.

⁴ Bowen Dep. at p. 56 ll. 22 -23; p. 57 ll.1-13. Routine replacements occur for telephone company joint users as well. Brooks Dep. at p. 21 ll. 3-20. "Q: So, for your own needs, as far as electrifying the service area, could also be a reason for changing out a pole? A: Yes." Deposition of Michael Dunn, Gulf Power's Manager of Project Services (Retired) ("Dunn Dep."), Hearing Exhibit 86, p. 62 ll. 17-20. "Q: Say I want to attach to a pole on such and such street and you say I'm sorry, that pole is at full capacity what usually happens next? A: You have a choice of going underground or rearranging the pole or of changing out the pole or of taking a different route." Bowen Dep. at p. 153 ll. 12-17.

⁵ Brooks Dep. at p. 21 ll. 3-16; Bowen Dep. at p. 266 ll.3-23; p. 267 ll.1-14. The process was described where a new attacher needs a new pole set to accommodate its attachment, pays for the new pole and then the utility will "come out, set the new pole, and once we made our transfers and everything is moved over then we would notify the other attachers on the pole that there is a changeout involved and we would list them in order of priority and the first one to go would be the highest attacher to the lowest attacher. Once the lowest attacher is transferred then we would tell the permitting company that they are clear to go." Bowen Dep. at p. 45 ll. 18-23 – p. 46 ll. 1-9.

⁶ "Q: Now, if a third party comes along ... and you have a number of poles that you need to change out for the new attachment to be safe ... who pays the cost of the change-out of that pole? A: If there is not existing room to accommodate the new attachment and the entities that are on the pole are in their proper space, then the new company requesting that room be made is responsible for paying [the utility] for the change-out...." Dunn Dep. at p. 63 ll. 23-25; p. 64, ll. 1-3.

⁷ "Q: You mentioned in a few instances there might be poles where for engineering you can't put a taller pole in, can you give me an example? A: If you're familiar with a regulator station it regulates the voltage, it's a two pole configuration with three regulators on a platform and because you're limited sometimes in the change of your line going from a shorter pole to a taller pole and in order to get their clearance underneath that platform and maintain

refuse changeouts, they deny access to poles, which Section 224(f)(2) allows only when two conditions are met: there must be insufficient capacity due to safety, reliability, or generally applicable engineering reasons, *and* any such denial for any one or more of those reasons must be on a nondiscriminatory basis.

Southern Co. explicitly rejected any interpretation of Section 224(f)(2) that would allow the utility pole owner to deny access unilaterally: "Petitioners' construction of the Act, which claims that the utilities enjoy the unfettered discretion to determine when capacity is insufficient, is not supported by the Act's text."⁸ *Southern Co.* also pointed to the precise formulation for making sense out of Section 224(f) while respecting its limits and its requirement for nondiscrimination. *Southern Co.* turned on Section 224(f)(1)'s nondiscriminatory grant of access requirement, not Section 224(f)(2)'s nondiscriminatory denial of access standard, which underlies the petition for reconsideration of the *Pole Order* as to nondiscriminatory changeout. In *Southern Co.*, the court found that the nondiscriminatory access requirement in 224(f)(1) did not require the utility to grant access to all poles in all locations as they FCC had directed. What *Southern Co.* did not address was the second half of the calculus – that putting aside any access requirement, any access *denial* must also be nondiscriminatory under 224(f)(2). In other words, a utility may not expand capacity for some attachers while refusing to do so for others.

Commissioner Powell elaborated on this point, and the court agreed: "the better reading is that [on] request for attachment, [a] utility is not mandated to expand capacity ... [by] the non-discrimination principle [in] section 224(f)(1)," but rather "must only ensure ... denials ... are done [] on a non-discriminatory basis" as Section 224(f)(2) requires.⁹ In other words, to meet the statutory requirement that access denials under Section 224(f)(2) be nondiscriminatory, a utility's insufficient capacity denial must be based on the same nondiscriminatory terms and conditions with respect to pole replacement that it "imposes on third parties as well as itself."¹⁰ Accordingly, where, as in almost all instances, changeout is a form of makeready utilized for the utility itself or some attachers, it cannot be denied to other attachers in a discriminatory manner.

proper ground clearance you might have to go up substantially with those two poles so that there's too much strain on the line coming into it from the adjacent poles, so you might have to object to changing those out to anything taller because of those constraints...." Brooks Dep. at p. 46, ll. 16-23 – p. 47 ll. 1-7.

⁸ 293 F.3d at 1347-48.

⁹ *Southern Co.*, 293 F.3d at 1346; *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd. 18049, 18099 (1999) ("*Local Competition Recon. Order*").

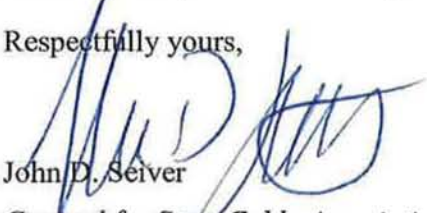
¹⁰ The Commission required that "terms and conditions [of attachment] must be applied on a *nondiscriminatory basis*," as that term applies to all local competition/interconnection matters, including pole attachments. *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd. 15499, 16073 & n.2833 (1996) ("*Local Competition Order*") (citing §§ IV.G & V.G in same). "Nondiscriminatory" is defined as requiring an entity to apply the same terms and conditions it "imposes on third parties as well as itself," *id.* at 15612 (in § IV.G), which can be avoided only where "it [is] technically infeasible" to provide "equal-in-quality" treatment. *Id.* at 15658-59 (in § V.G). This part of the Commission's ruling was not reversed in *Southern Co.* or by any other court.

Adopting this approach would be faithful to all parts of the Act. There may indeed be locations without the physical capacity to raise lines and still pass under overpasses, trolley wires, or some other engineering impossibility, and the outcome would be the same regardless of who made the request to replace the pole.¹¹ There may be other instances, as EEI has said, where “community standards, engineering, and access issues ... preclude ever-larger poles from being used.”¹² But there must be a nondiscriminatory basis for that denial. The *Southern Co.* court thrice repeated that it was rejecting the capacity expansion requirement only “where it is agreed that capacity... is insufficient to accommodate a proposed attachment (emphasis added).”¹³ In construing Section 224(f)(2), the court held that when the question of “‘insufficient capacity’ ... is ambiguous,” (i.e., when the parties do not agree that capacity is insufficient), the FCC is given the “discretion [to] fill[] that ‘gap in the statutory scheme.’”¹⁴

Requiring such nondiscriminatory changeout still gives meaning to the right of utilities to deny access for safety, reliability, or generally applicable engineering reasons. As noted above, the record here and in prior proceedings shows that changeout will not be required if it is physically impossible, cost-ineffective, or not already the utility’s practice, or if regulatory or other barriers are present, including terrain or zoning limitations. The petitioners seeking reconsideration have sought only to clarify that changeouts are required on a nondiscriminatory basis and for legitimate engineering purposes. At bottom, all that is sought is the ability to bring to the Commission disputes over whether capacity is truly insufficient and access denials are truly being made on a nondiscriminatory basis.

There must be a forum to test unilateral claims by utilities, and the Court left it to the Commission to serve as the forum for resolving claims of *discriminatory* denials for insufficient capacity. Exercising that discretion in favor of nondiscriminatory access meets the purpose of the Pole Act and today’s broadband imperatives.

Respectfully yours,



John D. Seiver

Counsel for State Cable Associations and Cable Operators

¹¹ *Southern Co.* also accepted the FCC’s application of Section 224 to all of a utility’s poles once any pole owned by it was used for communications purposes “regardless of whether the [particular pole to which attachment may be sought] is presently being used for telecommunications purposes.” *Southern Co.*, 293 F.3d at 1350. Similarly, once it is established that a pole owner changes out poles for itself or others, pole replacement throughout the utility’s service area would be part of the makeready process for access that could not be discriminatorily denied.

¹² Opposition of Edison Electric Institute, WC Docket No. 07-245, GN Docket No. 09-51, Nov. 1, 2010, at 7.

¹³ See *Southern Co.*, 293 F.3d at 1346, 1347, 1352.

¹⁴ *Pole Order*, 25 FCC Rcd. at 11871 (quoting *Southern Co.*, 293 F.3d at 1348).

Ms. Marlene H. Dortch
March 16, 2011
Page 5

Ex Parte
WC Docket No. 07-245
GN Docket No. 09-51

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Mr. Bill Dever
Mr. Albert Lewis
Mr. Jeremy Miller
Mr. Marcus Maher
Mr. Marvin Sacks
Mr. Wes Platt
Mr. Dick Kwiatkowski

Attachments: Exhibit 1 – Deposition Excerpts

EXHIBIT 1

BEN BOWEN DEPOSITION EXCERPTS

1 Before The
2 FEDERAL COMMUNICATIONS COMMISSION
3 Washington, D.C. 20554
4
5
6 FLORIDA CABLE TELECOMMUNICATIONS
7 ASSOCIATION, INC., COX COMMUNICATIONS
8 GULF COAST, L.L.C., et al,
9 Complainants,
10 vs. E.B. Docket No. 04-381
11 GULF POWER COMPANY,
12 Respondent.
13
14 DEPOSITION OF BEN BOWEN
15 Taken by Lauren S. Dorgan, a Court Reporter
16 and Notary Public, State of Florida at Large, in
17 the offices of Beggs & Lane, LLP, 501 Commendancia
18 Street, Pensacola, Florida, on September 14-15,
19 2005, commencing at approximately 9:00 a.m.
20 ANCHOR COURT REPORTING
21 229 South Baylen Street 6856 Caroline Street
22 Pensacola, Florida 32502 Milton, Florida 32561
23 (850) 432-2511 (850) 626-6207
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1 INDEX OF TRANSCRIPT
2 WITNESS:
3 BEN BOWEN
4 Direct Examination by Mr. Seiver..... 3
5 Exh. A Sheet..... 346
6 Certificate of Witness..... 347
7 Reporter's Deposition Certificate..... 348
8
9
10
11
12
13
14
15
16
17
18
19
20
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22
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1 STIPULATION
2 It is stipulated and agreed by
3 Counsel for the parties that the
4 deposition is taken for the purpose of
5 discovery and/or evidence; that all
6 objections save as to the form of the
7 question are reserved to the time of
8 trial; and that the reading and signing of
9 the deposition is not waived, together
10 with notice of the original hereof.
11 * * * * *
12
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- 1 ~~Gulf Power poles and all of the associated things that~~
 2 ~~may go along with that and keeping track of it.~~
 3 Q Who are the people that would be involved with
 4 procurement is my first question, I guess buying the
 5 poles and whatever equipment?
 6 A Our purchasing department.
 7 Q There's a separate purchasing department? Who
 8 would be your person you would speak to most often in
 9 the purchasing department about purchasing or
 10 acquiring poles?
 11 A I don't have a name, I've never discussed
 12 purchasing with them so I wouldn't know.
 13 Q If a new pole needs to be purchased or a pole
 14 needs to be changed out, and I'll get to that process
 15 in more detail later, is there some way that you
 16 inform procurement or is that a different process?
 17 A I'm not involved in the day to day operations.
 18 Q But you are aware of poles being changed out?
 19 A We do it daily.
 20 Q ~~As far as not setting them, I think you used the~~
 21 ~~term not setting in the field, that's the actual~~
 22 ~~physical installation of the poles?~~
 23 A ~~That's correct, that would be done by a union~~

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- 1 employee or a contractor.
 2 Q Do you have any oversight of the contractual
 3 relationships with either the union or the third party
 4 contractors for installing the poles?
 5 A No, sir.
 6 Q Is there someone else that is responsible for
 7 that within Gulf Power?
 8 A Yes.
 9 Q Do you know who that is?
 10 A No, I do not.
 11 Q Just to be sure, some of the issues that we have
 12 listed in our bullets included things like make ready
 13 and changeouts and rearrangements and things of that
 14 sort. You're generally familiar with all those terms
 15 and what's required I presume; is that right?
 16 A I would agree with that, yes.
 17 Q Even though you don't personally supervise that
 18 work or direct the way it's performed; is that right?
 19 A I wouldn't direct individuals in the field
 20 actually doing it on a regular basis, but I would
 21 agree with that.
 22 Q Do you ever have the opportunity to do
 23 inspections yourself, whether formal or informal

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- 1 beyond just driving down the street and looking at the
 2 poles but looking at any work that's been done on the
 3 poles?
 4 A I have done that, yes.
 5 Q Usually with somebody from the department that
 6 is responsible for doing the work?
 7 A It could be them or the actual engineer that was
 8 involved with it or it could be with a contractor.
 9 Q Are you an engineer, Mr. Bowen?
 10 A My undergraduate degree is industrial technology
 11 with an emphasis on engineering.
 12 Q What year did you get that degree?
 13 A 1985.
 14 Q Do you have any post graduate degrees?
 15 A Yes.
 16 Q What are those?
 17 A MBA.
 18 Q I didn't ask you, where did you get your
 19 undergraduate degree?
 20 A West Florida.
 21 Q And your MBA?
 22 A University of West Florida.
 23 Q What year?

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- 1 A 1992.
 2 Q Working back from your position in 1995 with
 3 Gulf Power as a project service specialist were you
 4 employed by Gulf Power in a different position or with
 5 a different company?
 6 A I was employed by Gulf Power and I was in a
 7 different position.
 8 Q You were in a different position?
 9 A Yes.
 10 Q What was that position?
 11 A Field engineer.
 12 Q For how many years were you a field engineer?
 13 A Seven to eight years, from 1987 to 1995.
 14 Q Between the time you graduated from the
 15 University of West Florida and 1987, so from 1985 to
 16 1987 were you with Gulf Power?
 17 A I've been with Gulf Power since 1987 to the
 18 present, I haven't left or gone to another operating
 19 company.
 20 Q Between 1985 and 1987 what were you doing?
 21 A I was in graduate school and I was working at
 22 the University of West Florida at the same time.
 23 Q So after you graduated you did go to graduate

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1 to be on the high end. I have not done studying to
2 know what the average would be but from my experience
3 that would be on the high end.

4 Q From your experience what would be average make
5 ready charge for a new pole?

6 A A thousand to fifteen hundred is my
7 guesstimation, but that's not based on any study.

8 Q These just your experience?

9 A Yes, sir.

10 Q Whatever the documents show is what the
11 documents show, right.

12 A Absolutely, John. Of course you should know
13 when you had access to all those when you were down
14 here.

15 MR. LANGLEY: Ben, just answer his
16 questions.

17 BY MR. SEIVER:

18 Q When we go in this process and we're at the
19 point now where your engineer has said we need a new
20 pole, here is the cost of doing it, is the next step
21 for the proposed new attacher to pay Gulf Power?

22 A Yes.

23 Q And then Gulf Power comes out and sets the new

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1 quickly as we can in a safe manner that meets code and
2 everybody is happy when that goes smooth, that's what
3 we want it to do, go smooth quickly.

4 Q Would it be fair to say if the lowest attacher
5 moved first that could predetermine where the ones
6 above it go and there might not be space if they don't
7 attach in the right spot?

8 A You could say that.

9 Q You would rather have the new one or whoever is
10 going to be the highest be the first one to measure
11 down from the electric facility, set, and the next one
12 measure down, set, etcetera, etcetera down the pole?

13 A Yes.

14 Q In this process of making a determination of
15 whether a pole can accept a new attacher have you come
16 across a situation where a field engineer looks at a
17 pole and says we don't really need a new pole, we need
18 just to rearrange because either someone on the bottom
19 is higher than they need to be, they could drop down,
20 or we have some of our electric facilities in a spot
21 where there's a saggy drip loop that could be
22 tightened, a transformer that could be moved? I know
23 I'm giving you multiple questions but I'm trying to

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1 pole?

2 A We come out, set the new pole, and once we made
3 our transfers and everything is moved over then we
4 would notify the other attachers on the pole that
5 there is a changeout involved and we would list them
6 in order of priority and the first one to go would be
7 the highest attacher to the lowest attacher. Once the
8 lowest attacher is transferred then we would tell the
9 permitting company that they are clear to go.

10 Q Generally on your poles do you know if the
11 telephone company such as BellSouth is the lowest
12 attacher on the pole?

13 A They should virtually every time be the lowest.

14 Q So BellSouth would be the last to get notice?

15 A Typically, yes.

16 Q Have you ever had the situation where the lowest
17 on the pole moves their attachment before the higher
18 one on the pole?

19 A I've never seen that happen.

20 Q But that would not be right?

21 A Well, if you go out of order you're running the
22 risk of messing up the space for the permittee, and
23 what we're trying to do is get the permittee on as

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1 make it as broad as I can. Are those situations that
2 are considered part of make ready analysis by a field
3 engineer?

4 A Yes, those types of analysis would be part of
5 make ready. Now, that make ready just to be fair may
6 not be with Gulf.

7 Q Right, it may be with BellSouth if they're at
8 23 feet and they can be at 21?

9 A That's their call. They contractually have a
10 space that they want to be in, if they are outside of
11 it that's between the permitting party. For example,
12 let's say one of your clients Cox Communication asked
13 me to talk to BellSouth on their behalf to see if they
14 could lower it to expedite something I would be glad
15 to do that for him.

16 Q Just so I understand, when you say BellSouth has
17 a contract I presume that's referring back to the
18 joint use agreements between BellSouth and Gulf Power?

19 A Yes, that's correct.

20 ~~Q Is it your understanding, I'm not asking you~~
21 ~~this as a lawyer, that BellSouth's space is different~~
22 ~~than if a cable operator is attaching? I think you~~
23 ~~had mentioned earlier about being a locco and being~~

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- 1 Light issue, you have at least intervened to tell them
2 that they had to correct whatever problems they had
3 caused?
4 A Yes.
5 Q Did you go out and look at the installation
6 yourself, the attachment yourself?
7 A I did.
8 Q You could tell that it was not within code?
9 A It wasn't close.
10 Q Was there a requirement for a changeout or a
11 rearrangement in order for them to actually attach in
12 that location, do you recall?
13 A There is going to be changeouts required on that
14 job and I don't know the status of it at this point,
15 but yes, that is going to be required.
16 Q When changeouts are done, we haven't really
17 talked about this yet, generally that's to put in a
18 taller pole that has more space?
19 A In a generic sense you would change out for
20 strength or for height, typically in most cases it's
21 for height.
22 Q I want to talk about strength and height, but at
23 least on height is there a standard Gulf Power pole

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- 1 height that you have poles in inventory that you
2 deploy on a standard basis? Again, I'm not trying to
3 corner you, I'm not going to show you something if you
4 say it's 40 and I say it says 37 and a half, I'm not
5 doing that.
6 A There's no such thing as a 37 and a half or a
7 million feet. I think most everyone in this position
8 in the United States has read is that.
9 Q I think it goes in five foot increments; is that
10 right?
11 A That's correct, and 40 foot for a main line
12 cable would be a standard height pole.
13 Q And what kind of strength is that, is that by
14 class do you call them?
15 A Yes.
16 Q What's the standard one, is it Class C?
17 A The pole manufacturers use a numbering system.
18 Q Class One, Two, Three?
19 A There are class ones, twos, and threes, standard
20 would be a five.
21 Q As you get the lower number they get stronger.
22 A That's correct.
23 Q Stronger meaning the diameter of the poles

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- 1 increasing; is that right?
2 A That is correct. There may also be a species,
3 but I'm not sure.
4 Q But a different type of wood?
5 A Right, but I believe diameter is the main
6 ingredient in the formula.
7 Q But 40 foot, Class Five is generally what you do
8 for a pole?
9 A That is correct.
10 Q There are obviously in the field shorter poles,
11 there's some 35 foot poles out there on the main line
12 that may have been installed 35 years ago or at some
13 point in time?
14 A There are 35 foot poles that have main line in
15 it. In fact, a 35 foot pole could still hold a main
16 line today, but because of the telecommunication
17 industries it is not practical, but it would have to
18 be an older fairly dated pole for that to have been
19 used.
20 Q And there are 45 foot and 50 foot poles that you
21 also set for main line distribution?
22 A That's correct.
23 Q Is 50 the tallest, is there anything taller than

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- 1 that of a wood pole that you can set for main line
2 distribution?
3 A We can set taller poles based on the need and
4 the terrain, however once you get over about 45 foot
5 then you're exceeding the limits of our trucks to be
6 able to service and work on them.
7 Q Your trucks can handle a 50 foot pole or not?
8 A There are a select few that can do that.
9 Q Some trucks can do 50?
10 A Very few.
11 Q Can any do more than 50?
12 A In distribution?
13 Q Yes.
14 A I don't know that I can answer that question
15 accurately.
16 Q When you've done make ready or changeouts you
17 don't recall ever specifying a 50 foot pole?
18 A I have specified 50 foot poles.
19 Q Do you ever remember specifying anything taller
20 than that for a distribution line?
21 A No.
22 Q Where are the poles kept, are they in a regional
23 location, central location?

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Order FCC 06M-21

- 1 A What poles?
 2 Q 35, 40, 45, 50 foot distribution poles.
 3 A Whose poles?
 4 Q Gulf Power's.
 5 A Prior to being set I assume?
 6 Q Yes, that's what I meant.
 7 A Each district has a district office and a pole
 8 yard and they would be set in the pole yard. Some of
 9 those district offices have smaller offices and some
 10 of those also have smaller pole yards.
 11 Q That's the term I was looking for, it's called a
 12 pole yard where you keep your inventory of poles?
 13 A Yes.
 14 Q Going back to Exhibit 4 I wanted to look at
 15 Plate C3, this is the next page, and I just want to
 16 ask you a couple of questions here. That line on the
 17 top of the pole, the electric line versus the three
 18 that are on the conductors a little bit further down
 19 the pole, are those different voltages or considered
 20 different kinds of facilities?
 21 A They are different voltages, they are also
 22 different size conductors.
 23 Q So let's look at the top pole, what's the

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- 1 topmost conductor?
 2 A That would be a single phase primary 7.2KV.
 3 Q That's actually in the title there, single
 4 transformer installation with 7.2KV. There's a wire
 5 dropping down to those fuses, what's the next thing
 6 down on the pole from the single phase line?
 7 A The next direct thing, there's two, one of them
 8 for slang is a saddle and the other is an insulator.
 9 Q What do those do?
 10 A The insulator is what allows the primary
 11 conductor to rest and not to energize the pole, to
 12 keep it mechanically separated from the conductor and
 13 the pole. The other item, the saddle, is where the
 14 jumper wire is attached that runs to the arrestor
 15 cutout.
 16 Q The arrestor, is that a little tube that's on
 17 the side?
 18 A The arrestor is that vertical component that's
 19 about one tenth of the way down the pole from the pole
 20 top head.
 21 Q I see. If we go down further on the pole, and
 22 now I'm looking at it on the left side where there are
 23 some larger items those are called - if I can point

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- 1 to it tell me what those are.
 2 A That's the cutout. That's a fairly widely used
 3 term throughout the U.S., any utility would understand
 4 that.
 5 Q Can you explain it to me?
 6 A A cutout, that is the fuse box for the pole.
 7 Q Does it cut off power if there's a short circuit
 8 or overload situation, is that what it's designed to
 9 do?
 10 A It would be the protection from - it could be
 11 used for a couple of things, it could be used to
 12 de-energize a transformer or it would be protection of
 13 the equipment say in a lightning storm.
 14 Q Is there a spot somewhere, I don't see any
 15 clearances, and I know this is for joint use
 16 construction, but where the fuse box or the cutout
 17 needs to be on the pole in comparison to the upper
 18 conductor?
 19 MR. LANGLEY: Do you mind repeating that
 20 question, I'm sorry, I missed it?
 21 MR. SEVER: I was asking Ben because a lot
 22 of clearances are marked on here about
 23 minimums and I don't see any clearances

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- 1 marked there, I'm assuming because this
 2 is about joint use and not about
 3 distribution construction.
 4 BY THE DEPONENT:
 5 A Let me help you out, John. This is always going
 6 to be an item that's going to be far, far away from
 7 your client's attachments, I don't think we need to
 8 get bogged down in how they're attached. We're
 9 chasing something that's not pertinent.
 10 Q I'm moving down the pole because I wanted to
 11 know what those were. I've seen the transformer tank
 12 which is fed from the bottom of the cutout, is that
 13 right, as well as I see the cutout also that looks
 14 like they have a big ground wire that runs down to the
 15 base of the pole?
 16 A Yes.
 17 Q And the transformer changes the voltage from the
 18 single phase 7.2 kilovolts to something else?
 19 A That's correct.
 20 Q What is it transferring to?
 21 A In this particular case because it's a single
 22 phase transformer it would be to 12240AC 60 Hertz.
 23 Q So those are three energized lines below it on

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- 1 yourself?
- 2 A Yes, I do.
- 3 Q What is your understanding?
- 4 A That would be a pole that is not able to
- 5 accommodate another attacher and still be able to
- 6 adhere to the guidelines of the NESC or other
- 7 appropriate governing rules and regulations.
- 8 Q In that situation when a pole is at full
- 9 capacity when someone, a cable operator, comes to you
- 10 for attachment what happens?
- 11 A Can you be more specific?
- 12 Q Say I want to attach to a pole on such and such
- 13 street and you say I'm sorry, that pole is at full
- 14 capacity what usually happens next?
- 15 A Then you have a choice of going underground or
- 16 of rearranging the pole or of changing out the pole or
- 17 of taking a different route.
- 18 Q To your understanding those four options were
- 19 available before and after the '96 act, am I right?
- 20 A Those options would be applicable in most any
- 21 year.
- 22 Q As far as the choice is concerned does Gulf
- 23 Power really care which one of those four is chosen by

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- 1 Numbers 810 through 814, five pages
- 2 entitled CATV permitting procedure.
- 3 BY MR. SEIVER:
- 4 Q I'm going to ask you to look at what's been
- 5 marked as Complainant's Exhibit 5 and ask if this is
- 6 something you're familiar with?
- 7 MR. LANGLEY: John, out of an abundance of
- 8 caution can we designate the discussion
- 9 of this exhibit as confidential
- 10 testimony?
- 11 MR. SEIVER: Sure.
- 12 BY MR. SEIVER:
- 13 Q Ben, is this a document you've seen before?
- 14 A Yes, it is.
- 15 Q Is this an entire document, these five pages
- 16 together, or do they happen to be stuck together or
- 17 are there more pages? Answer the last question first.
- 18 Is this everything for the CATV permitting procedure
- 19 for example or are there other pages that might be
- 20 missing?
- 21 A There is a form that the clerks fill out that is
- 22 not included here.
- 23 Q An exhibit? I notice there's no Exhibit A and

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- 1 the cable operator?
- 2 A We like it when they go underground.
- 3 Q You prefer them to go underground?
- 4 A No.
- 5 Q You like it but you don't prefer it?
- 6 A If it requires less work for our line department
- 7 then I would like it, but if they need to go overhead
- 8 then we can accommodate them.
- 9 Q And you do accommodate them, right?
- 10 A Absolutely.
- 11 Q If there is any change to that pole because of
- 12 its being at full capacity as we went through on make
- 13 ready there are costs that are assessed that the
- 14 attacher pays before they go on the pole?
- 15 A The amount figured from the work order, the
- 16 computer program, once that's paid then we could go to
- 17 rearranging slash make readying slash changing out.
- 18 ~~(Complainant's Exhibit No. 5 was~~
- 19 ~~marked for identification and a~~
- 20 ~~copy is attached to this record.)~~
- 21 MR. SEIVER: I'd like to mark as our next
- 22 exhibit a document that was entitled
- 23 confidential, Gulf Power Document

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- 1 no Exhibit C but they're sequential.
- 2 MR. LANGLEY: I think those are references
- 3 to the exhibits to an attachment
- 4 agreement and the denomination would be
- 5 example one, example two.
- 6 MR. SEIVER: That's fine.
- 7 BY THE DEPOSEE:
- 8 A Right, yeah. This is pretty much it except for
- 9 the clerks will fill in the permit number and all the
- 10 stuff it's talking about, that's just the form they
- 11 fill it in.
- 12 Q You say the clerk, that's someone within Gulf
- 13 Power?
- 14 A Yes, it would be.
- 15 Q Is clerk a formal name for them, make ready
- 16 clerk?
- 17 A That would just be one of their jobs, it would
- 18 be like a secretary.
- 19 Q Is this bound, this document we're calling
- 20 Exhibit 5?
- 21 A It's loosely bound.
- 22 Q Does it go usually attached to an agreement?
- 23 A No, it's in a three ring binder.

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Order FCC 06M-21

1 A The make ready costs that Sprint would be
2 charged would be all the costs that would be accounted
3 for in the engineering program, the cost estimating
4 program.

5 Q So to the extent pre-inspection is included in
6 that program it would be included for this particular
7 definition?

8 A That's my understanding.

9 Q Are there any other hidden costs in the Sprint
10 situation of doing make ready not being recovered by
11 Gulf Power?

12 A John, I haven't really studied the costs
13 involved in make ready with Sprint, that's something
14 that's not done very often.

15 Q There's not much make ready done for Sprint?

16 A Very little.

17 Q When it is does it take priority over some of
18 the other work you might be doing?

19 A That decision would be made by the local office.

20 Q Maybe, maybe not, you don't know?

21 A My opinion would be that our electric service
22 customer need would take priority is my opinion.

23 Q Would you turn to Page 6, Article 6 of the

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1 difference is that Sprint pays full make ready and
2 BellSouth does not.

3 Q BellSouth only paid that differential between
4 the poles?

5 A Depending on the situation, and it's full make
6 ready like the cable operator would pay and Sprint.

7 Q Look at Article 6 B2 and let's have the
8 situation for purposes of answering this that Gulf
9 Power is setting a pole and Sprint says they want to
10 attach to it and instead of a 40 foot pole you need a
11 45 foot pole, B2 would require Sprint to pay you for
12 quote, the difference in total cost between the pole
13 set and a pole of the size the owning party would have
14 otherwise set, end quote; is that right?

15 A That's the way I read it.

16 Q ~~That's not full make ready in that situation, is~~
17 ~~it?~~

18 MR. LANGLEY: John, are you asking about
19 replacing an existing pole or new
20 construction?

21 MR. SEIVER: I'm asking him about B2, that's
22 the section I was quoting from.

23 BY THE DEPENDENT:

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1 Sprint agreement?

2 A Okay.

3 Q I guess I should have asked a preliminary
4 question, are you familiar with this joint use
5 agreement?

6 A I'm familiar with it, yes.

7 Q Were you involved in negotiating it with Sprint?

8 A Yes, I was.

9 Q Were you the chief negotiator?

10 A Yes, I was.

11 Q Looking at Article 6, if you need to read it
12 please do but I was going to ask you if this
13 particular provision involves something different than
14 with BellSouth for purposes of payment for the setting
15 of poles to be used by Sprint?

16 A Shoot that question back to me again, I was just
17 reading over this article. This is replacing and
18 relocating poles.

19 Q Does Article 6 establish a different regime for
20 reimbursing Gulf Power for example for setting poles
21 that would be used by Sprint compared to the BellSouth
22 agreement?

23 A Just in a broad sense and an overview the basic

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Order FCC 06M-21

1 A It appears to me that this is describing a new
2 pole line and it's asking the non owning party to pay
3 the owning party the difference between the pole that
4 they were going to set versus the one that the non
5 owning party wants.

6 Q Because Gulf was going to set a pole anyway so
7 it's just the incremental cost of the larger pole?

8 A That's what it sounds like to me.

9 Q You don't know whether that's measured the same
10 way that you did for BellSouth where you have a
11 schedule of what a new pole costs?

12 A We would go by the cost of the pole that day
13 that the work order was run.

14 Q For B3 it does indicate there at the top of
15 Page 7 for attaching to an existing pole if it needs
16 to be changed out then it's make ready; is that right?

17 A Mm-hmm.

18 Q So instead of the BellSouth method of just
19 paying the difference of whatever the replacement cost
20 is less the depreciated cost it was written in the
21 BellSouth agreement this is more traditional make
22 ready?

23 A I'm not sure what traditional make ready is but

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REX BROOKS DEPOSITION EXCERPTS

1

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FLORIDA CABLE TELECOMMUNICATIONS
ASSOCIATION, INC., COX COMMUNICATIONS
GULF COAST, L.P.C., et al.

Complainants,

vs. E.B. Docket No. 04-381

GULF POWER COMPANY,

Respondent.

DEPOSITION OF REX BROOKS

Taken by Lauren S. Dorgan, a Court Reporter
and Notary Public, State of Florida at Large, in
the offices of Beggs & Lane, LLP, 501 Commendancia
Street, Pensacola, Florida, on September 16, 2005,
commencing at approximately 9:00 a.m.

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3

INDEX OF TRANSCRIPT

WITNESS:

REX BROOKS

Direct Examination by Mr. Seiver..... 5

Errata Sheet..... 141

Certificate of Witness..... 142

Reporter's Deposition Certificate..... 143

DEPOSITION EXHIBITS

EXHIBIT NO: PAGE:

Complainants' Exhibit No. 25 6

Complainants' Exhibit No. 26 105

Complainants' Exhibit No. 27 110

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2

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4

STIPULATION

It is stipulated and agreed by
Counsel for the parties that the
deposition is taken for the purpose of
discovery and/or evidence; that all
objections save as to the form of the
question are reserved to the time of
trial; and that the reading and signing of
the deposition is not waived, together
with notice of the original hereof.

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Order FCC 06M-21

- 1 without paying any make ready, right?
- 2 ~~A That's correct.~~
- 3 Q If they need a taller pole or a stronger pole or
- 4 something needs to be rearranged, do they pay some
- 5 cost of that to Gulf Power if it's a Gulf Power pole
- 6 that they're seeking to go on for that additional
- 7 attachment?
- 8 A I believe if it's beyond the standard 40 foot
- 9 pole then they would pay some differential.
- 10 Q I won't go through that again, I did it with
- 11 Mr. Bowen yesterday, but depending on how old the pole
- 12 is is going to effect that?
- 13 A They get some credit for that old pole.
- 14 Q The fact that they're replacing it with a new
- 15 pole?
- 16 A Right.
- 17 Q When a cable operator pays make ready the cable
- 18 operator does not get any credit for replacing an old
- 19 pole?
- 20 A No.
- 21 ~~Q I'm going to ask you to look at what has been~~
- 22 ~~marked as Exhibit 9, which were Gulf Power's responses~~
- 23 ~~to complainant's first set of interrogatories. Do you~~

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- 1 information referring to the legal contentions as well
- 2 in the ongoing proceeding, do you have knowledge of
- 3 those?
- 4 A Yes, as well as I could maybe remember them.
- 5 Q Do you understand in the ongoing proceeding that
- 6 there is a request for a just compensation rate?
- 7 A Yes.
- 8 Q Do you have an understanding that prior to this
- 9 particular proceeding or hearing there was demands by
- 10 Gulf Power to the cable operators in and around the
- 11 year 2000 to pay a just compensation rate for pole
- 12 attachment rentals?
- 13 A Yes.
- 14 Q Were you involved in the calculation of that
- 15 pole attachment just compensation rate?
- 16 A To the extent that I plugged in the numbers, no,
- 17 but they got that information from accounting and put
- 18 in the Gulf Power numbers in the appropriate places
- 19 and did the calculation.
- 20 Q If you would go to Page 21 of this exhibit,
- 21 which is Exhibit 9, the answers to interrogatories,
- 22 there is Interrogatory Number 45, do you see that?
- 23 A Yes.

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- 1 remember participating in answering any of the
- 2 interrogatories? And I shouldn't do this as a trick
- 3 question because your name is listed in here as
- 4 participating on occasion, but I wanted to ask you if
- 5 you remembered it?
- 6 A I did participate in some of the discussions,
- 7 but specifically this document I don't know.
- 8 Q You don't think you've seen this actual document
- 9 before?
- 10 A No.
- 11 Q Look on Page 7, there's Interrogatory Number 11
- 12 and it's asking Gulf Power to identify all persons
- 13 whether or not employed by Gulf Power that have
- 14 knowledge or information regarding facts on legal
- 15 contentions, and I'll represent to you that that's the
- 16 complaint proceeding plus the ongoing proceeding as
- 17 well as Gulf Power's intentions in the January 2004
- 18 description of evidence and December 2004 preliminary
- 19 statement, alternative cost, methodology, and a number
- 20 of names which Number 1 is Ben Bowen but Number 12 is
- 21 Rex Brooks, do you see that?
- 22 A Yes.
- 23 Q Do you remember, do you have knowledge or

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- 1 Q There's a listing of the joint use rates for
- 2 BellSouth, Sprint, and GTC, do you see that?
- 3 A Yes.
- 4 Q Along with the ILEC space that's leased on the
- 5 various heights of the poles?
- 6 A Yes.
- 7 Q Looking below that where it says rate equals
- 8 investment times annual charge times space allocation,
- 9 do you see that?
- 10 A Yes.
- 11 Q Is that a formula that you use when calculating
- 12 rates for the joint users?
- 13 A Yes, it would be.
- 14 Q Do you remember the components of those
- 15 particular things, what the investment and annual
- 16 charge and space allocations were for any of the
- 17 three, BellSouth, Sprint, or GTC?
- 18 A The specific numbers, no.
- 19 Q Do you remember what number you used for
- 20 investment, was it a per pole number based on the
- 21 value like in the back of the BellSouth exhibit or was
- 22 it some other number?
- 23 A The investment I believe would have been the

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- 1 Q Up until I guess the year 2000 you used that FCC
2 formula for cable operator attachments; is that right?
3 A Yes.
4 Q Do you know why starting in 2000 there was a
5 change?
6 A My understanding is that it's due to the
7 mandatory access.
8 Q And as far as you knew up until 2000 or at any
9 point was Gulf Power voluntarily or willingly allowing
10 cable operators onto their poles?
11 A Yes.
12 Q As long as they executed an agreement and paid
13 make ready and paid the rental rate?
14 A Yes.
15 Q Was it your understanding it was the 1996 act
16 that had the mandatory access provisions?
17 A Yes.
18 Q Do you recall ever denying a cable operator the
19 opportunity to attach to a pole?
20 A Only in limited cases but mainly because of
21 engineering. Of course, you initially deny it even
22 for NESC situations where there's not enough room
23 until they're willing to pay the make ready, but there

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- 1 get their clearance underneath that platform and
2 maintain proper ground clearance you might have to go
3 up substantially with those two poles so that there's
4 too much strain on the line coming into it from the
5 adjacent poles, so you might have to object to
6 changing those out to anything taller because of those
7 constraints. And that hasn't been necessarily a
8 problem with some operators, just for that distance
9 they may go underground for a distance and then pop
10 back up.
11 Q As far as that is concerned specifically on the
12 situations where you just can't put a taller pole in
13 can you quantify how often that's happened?
14 A It's not that often.
15 Q Once a year, once every couple of years?
16 A I couldn't even speculate because you have not
17 only myself occasionally helping with some jobs,
18 you've got numerous engineering reps, I just don't
19 know.
20 Q But generally if a cable operator pays the make
21 ready or this third party attacher will pay the make
22 ready whatever it might be Gulf Power will go ahead
23 and do what is necessary to accommodate the attacher;

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- 1 were cases where because of engineering practice you
2 just physically could not change the height of the
3 pole possibly and they would just go underground for a
4 few spans.
5 MR. LANGLEY: John, so the record is clear
6 on this, were you asking about pre 1996
7 or ever?
8 MR. SEIVER: Pre '96.
9 MR. LANGLEY: Rex, did you understand the
10 question that way?
11 BY THE DEPOSEE:
12 A Yes.
13 Q I was going to say after 1996 did that process
14 that you just discussed change?
15 A No.
16 Q You mentioned in a few instances there might be
17 poles where for engineering you can't put a taller
18 pole in, can you give me example?
19 A If you're familiar with a regulator station it
20 regulates the voltage, it's a two pole configuration
21 with three regulators on a platform and because you're
22 limited sometimes in the change of your line going
23 from a shorter pole to a taller pole and in order to

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- 1 is that right?
2 A In general.
3 Q For purposes of the ongoing relationship I think
4 we've established that if the cable operator or
5 telecom carrier pays for a change out for a taller
6 pole there is no credit given back against the rental
7 for that, he continues to pay rent on the new pole; is
8 that right?
9 A Yes.
10 Q The poles are generally in five foot increments;
11 is that correct?
12 A Correct.
13 Q If for example a 40 foot pole is inadequate and
14 the operator pays for a 45 foot pole, who gets any
15 revenue that might come from the additional four feet
16 of space if you assume the operator is going to use
17 one of the five feet and the additional four foot of
18 space of that is running down to a third party?
19 A Gulf Power would get that additional space.
20 Q As far as the existing poles that are in the
21 field that are being changed out on these particular
22 situations where there's make ready would it be fair
23 to say that at the moment make ready is being done on

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MICHAEL DUNN DEPOSITION
EXCERPTS

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

TELECOMMUNICATIONS ASSOCIATION,
INC., COX COMMUNICATIONS GULF
COAST, L.L.C., ET AL,

Complainants,

vs.

CASE NO.: 04-381

GULF POWER COMPANY

Respondent.

DEPOSITION OF MICHAEL R. DUNN

Taken by Pamela Dee Smith, a Court Reporter and Notary
Public, State of Florida at Large, in the offices of
Beggs & Lane, LLP, 501 Commendencia Street, Pensacola,
Florida, on Wednesday, November 16, 2005, commencing
at approximately 9:30 a.m.

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INDEX OF TRANSCRIPT

WITNESS:

MICHAEL R. DUNN

Direct Examination by Mr. Seiver.....04
Certificate of Oath.....188
Reporter's Deposition Certificate.....189

INDEX OF COMPLAINANTS' EXHIBITS

28 Notice of Deposition of Michael R. Dunn..05
29 Affidavit of Michael R. Dunn with
Attachments.....39
30 Gulf Power Company Roll Forward Ledger
Distribution Plant Units.....112
31 Second Affidavit of Michael R. Dunn.....132
32 U.S. Court Of Appeals for the Eleventh
Circuit Decision 311 F.3D 1357.....136
33 Third Affidavit of Michael R. Dunn.....167

STIPULATION

It is stipulated and agreed by Counsel for
the parties that the deposition is taken for
the purpose of discovery and/or evidence;
that all objections save as to the form of
the question are reserved to the time of
trial; and that the reading and signing of
the deposition are waived, together with
notice of the original hereof.

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Whereupon, the witness,

MICHAEL R. DUNN,

having been first duly sworn by the Court
Reporter, testified on his oath as follows:

DIRECT EXAMINATION

BY MR. SEIVER:

Q. Good morning, my name is John Seiver.
I am counsel for the Complainants in a proceeding
that's pending of the FCC against Gulf Power. I
represent a number of cable operators around the
country; but for this particular case, it is in
the West Florida, North Florida area, including
Gulf Power — mostly for Gulf Power service area.
Have you had your deposition taken before?

A. Yes, I have.

Q. Actually, may I have you also state
your name for the record and spell it?

A. It is Michael R. Dunn, M-I-C-H-A-E-L.
Dunn is D-U-N-N.

Q. And, Mr. Dunn, have you had your
deposition taken before?

A. Yes.

MR. LANGLEY: John, are we under
usual stipulations?

MR. SEIVER: Yes, the usual.

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Order FCC 06M-21

Q. In a transfer, just so I understand it, that usually occurs when you have a new pole next to an old pole and you are going to move facilities from the old pole to the new pole, when you say, "a transfer"?

A. That's correct. We may have transferred our attachments. And when you do that, the previous pole, which could be rotten, could be unsafe and the cable company may not have transferred their attachment. And if we see that as a hazard, we might actually do it, if the cable company is not responsive.

Q. Do you often cut the tops off or cut off the old pole down to the minimum height it needs to be, in order to hold the communications attachments that are there below Gulf Power's, before they get transferred?

A. It is one of the ways of making a transfer, preferable to setting a new pole in a manner where that doesn't have to occur. But when you can't do that, then you might have to do —

Q. Did Gulf Power — we're talking about replacing poles — go through the process of changing out its poles for its own needs, in other words, not at the request of a cable operator or a

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telephone company attacher?

A. Yes.

Q. And give me some situations where you might have to do a change-out for your own needs.

A. A pole could be rotten, could be hit by a car, there could be a road widening, a developer could come in and establish multiple lot lines and you may relocate. Those are all about this.

Q. Did you ever have a situation where you have got to increase your primary — the number of primaries or have new secondaries added to serve a new subdivision, for example, that might change, you know, a run of poles along a main road?

A. Yes.

Q. So, your own needs, as far as electrifying the service area, could also be a reason for changing out a pole?

A. Yes.

Q. And when you do change-out the poles for your own needs — when I am saying, "your own needs," I am distinguishing that from when a car hits it or something like that or it rots, just for your own needs — do you charge any of the

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cable attachers any costs in order to have them transfer to a new pole?

A. No. Their presence may require that we set a taller pole. But if we had accepted their attachment on the previous pole, then we do not charge an additional cost.

Q. Now, if a third party comes along — let's say we've got the power company, Gulf Power, Southern Bell or BellSouth and a cable operator on a pole and another entity comes along, for example, Southern Light, and says, "We want to get into the telecom business," and they talk to you about negotiating an agreement and getting on a pole and you tell them, "Okay, these poles need make-ready, these poles don't because there is a difference in height and maybe a difference in the way that the heights are required for the NESC based on undeveloped land or highways or railroad lines, but you have a number of poles that you need to change-out for the new attachment to be safe. On that assumption, who pays the cost of the change-out of that pole?"

A. If there is not existing room to accommodate the new attachment and the entities that are on the pole are in their proper space,

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Order FCC 06M-21

then the new company requesting that room be made is responsible for paying us, Gulf, for the change-out. The other attachers are responsible for making transfers of their own facilities.

Q. For transfers of their own facilities?

A. Yes.

Q. But you don't charge the existing attachers the cost of the new pole or the cost to replace the pole directly?

A. No. If they are in there, in their proper location, if they happen to attach too high and there would be room for the next party to be added, we might request that the existing company lower its facilities.

Q. And that is relatively common, isn't it, to have that kind of a situation where somebody might just have to lower a little bit to allow a new person to come in?

A. It is not unusual.

Q. And when that occurs, again, the expense of the rearrangement, it will depend on whether you seem to suggest that the existing attachers are in the right space. For example, were you suggesting that maybe an attacher was in

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